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03-724

No. 03-___

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IN THE

Supreme Court of the United States

F. Hoffman-LaRoche, Ltd., et al.,
Petitioners,

v.

Empagran, S.A., et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Foreign Trade Antitrust Improvements Act preclude this suit, in which respondents were injured as a result of the effect of petitioners' unlawful conduct on U.S. commerce?

RULE 29.6 STATEMENT

Respondent Empagran has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Empagran.

Respondent Nutricion has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Nutricion.

Respondent Windridge is the business name for the business owned and operated in partnership by Cynray Pty. Ltd. and Larkray Pty. Ltd. Both of these companies are proprietary limited companies, all of the shares of which are held by natural persons.

The parent company of respondent Brisbane is Brisbane Export Holdings Pty. Ltd. No publicly held company has a 10% or greater ownership interest in Brisbane.

Respondent Stirol has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Stirol.

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INTRODUCTION

Petitioners seek review of the D.C. Circuit's holding that a provision of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. 6a(2) (hereinafter, "Clause 2"), does not extinguish the district court's jurisdiction under the Sherman Act over conduct that affects U.S. commerce in those instances in which the particular plaintiff is injured in foreign commerce. Certiorari should be denied for three reasons.

First, to the extent the narrow conflict described by petitioners even exists, this is an inappropriate case to resolve it. Most significantly, the answer to the question presented makes no difference to the outcome of this case, in which respondents allege that they were injured by the anticompetitive effects *on U.S. commerce* of petitioners' conspiracy. In addition, the case is interlocutory, and the record details numerous important questions of federal law that remain to be resolved in the proceedings now underway in the district court. Indeed, the proceedings on remand will substantially illuminate the very jurisdictional question presented by the petition.

Second, this Court should allow the question presented to percolate in the lower courts. The courts of appeals have issued only three decisions on this issue, all very recently, and all of which are consistent with each other in light of the particular allegations presented by the respective cases. It thus remains unclear whether a genuine conflict exists. There is furthermore a substantial prospect that the Fifth Circuit, which is the only outlier court of appeals and which has seen each succeeding circuit adopt a different reading, will reverse itself en banc in a later case. For this Court to intervene at this early stage would also interrupt the lower courts' nascent exploration of a variety of related issues not presented by this particular case, including the role of comity considerations and the standards articulated by the Restatement of the Foreign Relations Laws.

Third, the decision below is correct on the merits. The D.C. Circuit's reading is most consistent with the text of Clause 2, which requires that the domestic effect of the defendants' conduct (here, the effect of petitioners' unlawful conspiracy on

U.S. markets) "give[] rise to a claim" under the Sherman Act. Petitioners do not seriously dispute that their conduct did have such an effect, and there is no warrant for their attempt to rewrite the statute as if it extinguished the rights of all foreign and domestic plaintiffs injured in overseas transactions. Petitioners' principal argument seems to be that the D.C. Circuit's reading marks a substantial departure from pre-FTAIA law, and thus represents an extraterritorial expansion of U.S. antitrust jurisdiction. But that contention fundamentally misstates the law as it stood in 1982, given that it has long been "well established" that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). See also, *e.g.*, *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927). Petitioners also rely very heavily on developments since Congress enacted the FTAIA, such as the expansion of both foreign antitrust regimes and the federal government's amnesty program, none of which illuminate Congress's intent in 1982, and all of which are properly raised before the legislature rather than this Court.

Certiorari accordingly should be denied.

I. This Case Presents An Inappropriate Vehicle To Decide The Question Presented.

Certiorari should be denied because, for two reasons, this case is an inappropriate vehicle to decide the question presented. *First*, the district court would have had jurisdiction on either reading of Clause 2 because respondents properly alleged that their injury arose from the effects of petitioners' conspiracy on U.S. commerce. *Second*, the petition is interlocutory and many important federal issues remain to be resolved on remand.

1. Certiorari is unwarranted because the answer to the question presented makes no difference to this case. Respondents prevail under either approach, because petitioners' unelaborated statement that "[r]espondents do not contend that they were injured in U.S. commerce" (Pet. 5) is simply inaccurate. Respondents allege that petitioners' cartel sought to

control the price of bulk vitamins in every region of the world by using the United States as the "benchmark" for pricing. Because vitamins are fungible and the market is integrated and interconnected – such that deviations from the cartel price in this country would have permitted respondents to avoid the cartel price in other markets – the cartel went to great lengths to keep both price and supply in worldwide equilibrium. In particular, petitioners manipulated both price and supply in other markets in order to adjust for shifts in the United States. See generally C.A. J.A. 15-18, 38-57, 59, 72-75, 77; C.A. Sealed S.A. 7-10, 12-13, 38-44, 47-49, 61-62.[1]

As set forth in respondents' complaint, "Defendants' anticompetitive activities and their effects have caused injury to the Plaintiff Classes both *inside the United States* and in foreign nations." Respts' Am. Compl. ¶ 110 (jurisdictional allegation for "Count I: Violation of Sherman and Clayton Acts") (emphasis added).[2] As respondents argued in the district court,

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[1] The material in the Court of Appeals Sealed Supplemental Appendix is subject to a protective order and cannot be discussed in this Opposition. Suffice it to say that it contains direct and irrefutable evidence that petitioners explicitly recognized the prospect of arbitrage if prices in the United States differed from those in Europe and Asia. The evidence furthermore reflects both that petitioners recognized that the worldwide vitamins market is highly integrated, and that petitioners consistently allocated market share and set prices. Although there is accordingly direct evidence in the record, petitioners could not in any event contend that respondents have adduced an insufficient factual foundation for this jurisdictional basis for their claims. Because "in the Sherman Act context, jurisdictional facts are often closely intertwined with the merits of the claim, at the motion to dismiss stage, 'it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at the trial stage.'" *Carpet Group Int'l* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 72 (CA3 2000) (quoting *Mortensen* v. *First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 892 (CA3 1977)).

[2] See also Respts' Am. Compl. ¶ 3(a) (alleging that the purpose of the conspiracy was "to fix and maintain prices and to

"What we see is the prices in the United States were integrally interconnected with the prices outside of the United States. Pricing inside reflected pricing outside. * * * There was a unitary world market where virtually all purchasers, regardless of their site, were considered fungible, and an injury in one market caused an injury in every other segment of that market." C.A. J.A. 72. "If you affected the prices in the United States, you affected the prices around the world, regardless of where you were, and that's why even the [Fifth Circuit] majority in *Statoil* [*Den Norske*] says the antitrust laws of the United States are designed to prevent and to permit relief." *Id.* 74.[3] Respondents fully briefed the issue below.[4] It was also a principal focus of the oral argument in the court of appeals.[5]

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coordinate price increases for the sale of various vitamins throughout the United States and foreign countries"); *id.* ¶ 75 ("The Class Vitamins of Defendants are sold in interstate commerce in the United States."); *id.* ¶ 76 ("The Class Vitamins are considered to be commodities * * *."); *id.* ¶ 80(b)(1), (2) (stating that the conspiracy included an agreement to "fix, increase, and maintain prices and to coordinate price increases for the sale of such vitamins in the United States and elsewhere" and "allocate among corporate conspirators the volume of sales and market shares of such vitamins in the United States and elsewhere"); *id.* ¶ 94(j) (stating that the conspiracy included an agreement under "which the North American [petitioners] agreed to leave the European vitamin markets and the European [petitioners] agreed to leave the North American vitamin markets").

[3] See also *id.* 72 ("Arbitrage would wipe out literally most of the anticompetitive acts that they sought to impose in any one region, because the product could then be shifted to another part of the world.").

[4] See Respts' C.A. Br. 10-15 ("Appellants Meet the Jurisdictional Standard of the FTAIA As Set Out by the District Court" (heading)); Respts' C.A. Reply Br. 2-4 ("The District Court's Decision Was Premature As Plaintiffs Have Demonstrated A Set Of Facts That Would Entitle Them To Relief" (heading)).

[5] See, *e.g.*, No. 01-7115, Oral Arg. Tr. 6 (The Court: "And as I understand your argument, regardless of whether we go with the

The D.C. Circuit accordingly recognized that the complaint alleges that petitioners' "unlawful price-fixing conduct had adverse effects *in the United States* and in other nations that caused injury to [respondents] in connection with their foreign purchases of vitamin products." Pet. App. 1a (emphasis added). The court of appeals thus detailed respondents' argument that their complaint states a viable cause of action even under the restrictive view of the FTAIA that petitioners advance in this Court:

> [Respondents] contend that [petitioners] caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, [respondents] say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to [respondents], the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, [respondents] claim that *[they] were injured as a direct result of the increases in United States prices* even though they bought vitamins abroad.

Pet. App. 3a (emphases omitted and added).

Fifth Circuit or the Second Circuit, you should still prevail."); *id.* 7 (The Court: "You say defendant's anticompetitive activities and their effects have caused injury to the plaintiff classes, both in the United States and in foreign nations."); *id.* 18 (The Court: "One of the things you argue is that the District Court never decided your claim that the – that your action does arise from the U.S. effects, although I think it would be more properly, the U.S. injury of the global conspiracy."); *id.* 25 (The Court: "Right, but the argument would be that if indeed the U.S. price was the benchmark and you have all these domestic plaintiffs who are claiming that they were injured by this conduct as well, then the adverse effect is necessarily connected with the United States.").

The question presented thus makes no difference to the outcome of this case. In particular, there is every reason to believe that the Fifth Circuit would not deem this suit precluded by the FTAIA. That court in *Den Norske Stats Oljeselskap AS* v. *Heeremac v.o.f.*, 241 F.3d 420, 427 n.22 (2001), *cert. denied*, 534 U.S. 1127 (2002), articulated "the proper inquiry" under its ruling to be, "regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce?" Here, it did. Certainly, no court of appeals has held that a claim like respondents' is precluded by the FTAIA. Although the D.C. Circuit found it unnecessary to reach this "alternative" jurisdictional basis, it is fully preserved and would be pressed by respondents as their first ground for affirmance if this Court were to grant review.

2. This is also an inappropriate vehicle to decide the question presented because the court of appeals "remand[ed] the case for further proceedings." Pet. App. 39a. The petition is thus interlocutory, a factor that is itself generally sufficient to deny certiorari. See *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari); see also, *e.g.*, Invitation Br. for U.S., No. 02-815, *City of Sacramento* v. *Barden* 15-18, *cert. denied*, 123 U.S. 2639 (2003). This is a classic instance in which that rule applies, as this case presents no extraordinary ground justifying interlocutory intervention.

To the contrary, this case is especially likely to generate other federal issues that could merit review in this Court. As petitioners explained below, but ignore in this Court, in their view, the petition presents only the "*threshold* issue of whether the litigation may proceed at all." Petrs' C.A. Stay Mot. 1 (emphasis added). Such piecemeal invocation of this Court's resources is seriously disfavored. The Court generally denies interlocutory review even when the underlying claims rest on *state law* and thus are unlikely to give rise to further federal questions. See, *e.g.*, No. 03-281, *Consumers Union* v. *Suzuki Motor Corp.*, *cert. denied*, 2003 U.S. LEXIS 8027 (Nov. 3, 2003).

The record thus reflects an array of important federal law issues that are raised by the ongoing proceedings in the district court and that could merit eventual review in this Court or could otherwise resolve the case. According to petitioners,

> Further proceedings in the District Court will immediately raise critical issues of class certification, personal jurisdiction and venue. For example, a consideration of whether the claims of purchasers in different countries all around the world are sufficiently common to allow for class certification will certainly be a hotly disputed issue. Regardless of whether any previous discovery relevant to United States purchasers proves useful in prosecuting an action brought on behalf of exclusively foreign purchasers, a significant amount of novel discovery will be required if the case proceeds, including, for example, expert analysis of the economic conditions in each of the separate countries in which the foreign purchases were allegedly made.

Petrs' C.A. Stay Mot. 10. Other federal law questions that will be addressed on remand are easily located in petitioners' filings. For example,

- Petitioners apparently intend to allege that respondents' complaint fails under Clause 1 of the FTAIA because petitioners' conduct did not have a sufficient effect on U.S. commerce. Below, petitioners did not contest this issue "*for purposes of this appeal*." Pet. App. 9a (citing Oral Arg. Tr. 30-31) (emphasis added). The requirement of a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce presents a potentially "significant limit on the reach of the antitrust laws" that remains unexplored in the cases to date. *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384, 402 (CA2 2002), *cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003). Indeed, courts' efforts to decide "exactly what constitutes a 'direct, substantial, and reasonably foreseeable effect' have created uncertainty" that could later merit review in this Court. Richard W. Becker & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and*

Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?, 38 TEX. INT'L L.J. 11, 15 (2003).

- Petitioners have challenged the Sherman Act's constitutionality as valid Commerce Clause legislation, an argument the D.C. Circuit found "unnecessary for us to address" in light of the appeal's procedural posture. Pet. App. 9a. Certainly, petitioners' drive-by constitutional challenge to the Sherman Act, which they reiterate in this Court (see Pet. 15) but which has never been squarely resolved by *any* circuit, merits further consideration in the lower courts.
- The court of appeals directed the district court to exercise its discretion regarding the "supplemental jurisdiction over [respondents'] foreign law claims pursuant to 28 U.S.C. § 1367." Pet. App. 39a.
- Further, "[a]s to virtually all of the foreign defendants, personal jurisdiction was never litigated in the U.S. purchasers litigation, because most foreign Defendants stipulated to personal jurisdiction in the District of Columbia for purposes of actions *other than Empagran*." Petrs' C.A. Reply in Supp't of Stay 9 (emphasis in original).

Even more important, there will be discovery and a trial on the merits of respondents' federal antitrust claims. Those claims manifestly present complicated and important issues of federal law that could merit review in this Court. Of particular note, proceedings on the merits also will greatly illuminate the very issue that lies at the heart of petitioners' argument before this Court: that respondents' claims have an insufficient nexus to U.S. commerce. In this context above almost all others, the merits of plaintiffs' antitrust claims are inextricable from the determination whether the court should exercise jurisdiction. "Both inquiries rest on judgments about the apparent will of Congress with respect to foreign transactions. * * * Further, many appraisals of asserting jurisdiction include an appraisal of the anticompetitive harm caused by the challenged restraint—and the latter is largely a substantive inquiry." IA Phillip A.

Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 273a (2d ed. 2000). But not only has the trial in this case yet to be held, the Court would not have the benefit of the record in another, similar case, for no trial has *ever* been held on *any* complaint on which Clause 2 is determinative of jurisdiction.[6]

II. Any Conflict Should Be Allowed To Percolate In The Lower Courts.

1. This Court can safely allow the thin circuit conflict over the proper construction of Clause 2 alleged by the petition to percolate in the lower courts. To the extent that a conflict exists, it is merely two to one.[7] But in any event, the results in this case

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[6] The Areeda treatise thus suggests that the jurisdictional question presented by this case should be resolved in light of a more complete factual record:

> A 12(b)(1) challenge to the court's jurisdiction under the FTAIA can in fact proceed along two different routes. First, the defendant might simply argue that the complaint fails to *allege* sufficient facts upon which FTAIA jurisdiction can be established. * * * * Second, however, the defendant might offer a "factual" challenge, in which by affidavit or other means it alleges facts calling the court's jurisdiction into question. Such a challenge to subject matter jurisdiction necessarily goes beyond the face of the complaint. Because the issue goes to the power of the court to decide, at this point it is necessary for the court to make a factual inquiry under the general standards that apply to judicial factual determinations in bench trials—i.e., the judge need not use a summary judgment standard that interprets the facts in a way that favors the nonmovant, but rather must find the facts on his or her own.

IA Areeda & Hovenkamp, *supra*, ¶ 273c4 (Supp.).

[7] The Seventh Circuit has indicated its agreement with the majority rule in dictum. *Metallgesellschaft AG* v. *Sumitomo Corp. of Am.*, 325 F.3d 836, 840 (CA7 2003) (although declining to reach "a definitive resolution," concluding that Seventh Circuit precedent

and *Kruman* are consistent with those reached by the Fifth Circuit in *Den Norske*. This case and *Kruman* involve the fungible markets in bulk vitamins and auction services, respectively. Absent a worldwide conspiracy that elevated prices *in the United States*, the plaintiffs in both cases could have and would have made purchases in this country to avoid the higher prices set by the conspiracies overseas. In other words, the anticompetitive effect of the conspiracies in the United States directly contributed to the plaintiffs' injury. Such cases, in which the plaintiff "alleges a scheme in which there were explicit agreements to fix prices in both foreign and domestic markets," are "unique." *Kruman*, 284 F.3d at 402.

Den Norske is a very different case. It involved the defendants' alleged conspiracy to allocate geographically the market for heavy-lift barges. "Only six or seven heavy-lift barges exist *in the world*." *Den Norske*, 241 F.3d at 422 (emphasis added). The plaintiffs there merely alleged that the market allocation scheme permitted those defendants operating in the Gulf of Mexico "to maintain their monopolistic pricing." *Id.* at 425. As petitioners acknowledge, "the plaintiff's claim arose *exclusively* from its North Sea contracting and not from *any* impact of the conspiracy on U.S. commerce." Pet. 9 (emphases added).

Any conflict is furthermore likely to be corrected by the courts of appeals, just as the Federal Rules of Appellate Procedure contemplate. The Fifth Circuit stands alone among the courts of appeals in its reading of Section 6a. Petitioners acknowledge that *Den Norske* was "the first court of appeals decision to interpret the FTAIA." Pet. 9. Previously, "no circuit" had "interpreted the critical portion of the FTAIA at issue." *Den Norske*, 241 F.3d at 424 n.13. Two courts of appeals have since considered *Den Norske* and disagreed, as has another in dictum. This presents the classic circumstance in which rehearing en banc is favored and likely. The Advisory Notes to Federal Rule of Appellate Procedure 35 explain that en

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"appears to point in the direction of the approach taken by the D.C. and Second Circuits").

banc reconsideration is warranted when the court of appeals stands alone in its views. See Fed. R. App. P. 35, Adv. Comm. Notes to 1998 amendments.

The particular circumstances of *Den Norske* make application of that practice especially likely here. The Fifth Circuit's decision in *Den Norkse* is a two-to-one panel opinion with a strong dissent by Judge Higginbotham. *Critically*, no en banc poll was taken in that case because, "with three active judges recused, it would, as a practical matter, [have] be[en] nigh futile." CA5 No. 99-20763, Order of Mar. 12, 2001 (Higginbotham, J.). Other than in *Den Norske*, the Fifth Circuit "has never interpreted the relevant portions of the FTAIA as they apply to global conspiracies and resulting foreign injury." *Den Norske*, 241 F.3d at 424. There is accordingly a genuine prospect that the Fifth Circuit will revisit *Den Norske* and obviate the circuit conflict if that court is presented with the issue in another case.

The panel majority in *Den Norske* relied on readings of the Sherman Act and the Constitution that it is difficult to believe the full Fifth Circuit will embrace when given the opportunity to decide the question. The panel majority construed Clause 2 in light of its "doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act." 241 F.3d at 426. The panel majority furthermore deemed its reading "strengthened by the limits placed on Congressional power in the Constitution," which "gives Congress the authority only to regulate interstate commerce and 'commerce with *foreign* nations,'" such that "even if Congress indeed intended to regulate purely foreign commerce in the Sherman Act, it was not empowered to do so under the Commerce Clause." *Id.* at 426 n.18 (emphasis in *Den Norske*). And the panel emphasized the presumption against extraterritoriality. *Id.* at 427-28.

Even the United States, while supporting the Fifth Circuit's *result*, does not defend these central aspects of its reasoning. Further, the reasoning in *Den Norske* cannot be reconciled with this Court's precedents nor, importantly, with the jurisprudence of the Fifth Circuit itself. En banc reconsideration is thus likely.

"[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). As early as 1927, this Court "held that the Sherman Act authorized jurisdiction over foreign defendants, as long as some of the defendants' conduct occurred within the United States and the conduct affected domestic commerce." Pet. App. 10a (citing *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927)). Accordingly, no presumption against extraterritoriality applies. Contra Pet. 15. And even the *Hartford Fire* dissenters recognized that "this Court has repeatedly upheld [Congress's] power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected." 509 U.S. at 813-14. "The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States." IA Areeda & Hovenkamp, *supra*, ¶ 270.[8] See, *e.g.*, *Access Telecomm., Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 712 (CA5 1999) (Sherman Act recovery is allowed "for foreign conduct that produces 'some substantial effect in the United States'" (quoting *Hartford Fire*, 509 U.S. at 976)); *Industrial Dev. Corp.* v. *Mitsui & Co.*, 594 F.2d 48, 52 (CA5 1979) ("*American Banana* also held that the Sherman Act could not be applied against conspiracies occurring outside this country. That latter rule of law has been repudiated. Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States."), *cert. denied*, 445 U.S. 903 (1980).

2. Permitting the question presented to percolate would also have the substantial benefit of permitting the lower courts to explore the host of issues beyond the meaning of Clause 2 that

[8] For this reason, the D.C. Circuit's decision is completely consistent with the recognition that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

are related to jurisdiction but not presented by this case. The federal courts are presently grappling in international antitrust cases with several such issues. Petitioners' contention that the opinions issued by the courts of appeals to date "comprehensively set forth the competing considerations of law and policy" (Pet. 11-12) is thus mistaken. To the contrary, this case *fails* to present many of the "recurring question[s] of the extraterritorial reach of the U.S. antitrust laws." Contra *id.* 3. For this Court to decide the meaning of Clause 2 in an interlocutory posture and in a case in which those issues have been waived threatens to produce a distorted construction of the statute.

Petitioners thus treat Clause 2 as if it were the only unresolved issue with respect to limitations on the invocation of the Sherman Act in international cases. But the situation is not so simple. Commentators have proposed an array of standards that have never been explored by any lower court. The Restatement similarly suggests the application of standards relating to the "principal purpose" of the defendants' conduct and the reasonability of the suit. Restatement (Third) of the Foreign Relations Laws § 415 (1987). For its part, the Ninth Circuit holds that the FTAIA "qualified but did not undermine the basic comity doctrine it had previously elaborated." IA Areeda & Hovenkamp, *supra*, ¶ 273c3 (citing *In re Insurance Antitrust Litig.*, 938 F.2d 919 (1991), *aff'd in part, rev'd in part*, 509 U.S. 764 (1993)). However, petitioners, for whatever reason, waived all such arguments in this case in favor of their absolutist position.

Furthermore, the federal courts have given almost no attention to the FTAIA's introductory clause, which exempts from its application all "import commerce." Cf. *Dee-K Enters.* v. *Heveafil Sdn. Bhd.*, 299 F.3d 281, 287 (CA4 2002) ("[b]ecause this case involves importation of foreign-made goods, however – conduct Congress *expressly exempted* from FTAIA coverage * * * – the FTAIA standard obviously does not directly govern this case * * * ."). There is a substantial argument that international cartels, such as this one, that fix the prices of commodities that are imported into the United States

are not subject to the FTAIA at all. But that question is not presented here.

3. For all the foregoing reasons, the Court would benefit from permitting the questions presented and related issues to percolate further in the lower courts. Cf. *Nike* v. *Kasky*, 123 S. Ct. 2554 (2003) (Stevens, J., concurring in the order dismissing certiorari). That is the import of petitioners' own argument that the application of the federal antitrust laws in the international arena can in some cases raise sensitive questions. "The extraterritorial scope of our antitrust laws touches our relations with foreign governments, and so, it seems, it is prudent to tread softly in this area." *United Phosphorus, Ltd.* v. *Angus Chem. Corp.*, 322 F.3d 942, 952 (CA7 2003) (en banc).

Of note, two international antitrust cases are now proceeding through discovery and trial: this case and another in which a motion to dismiss on FTAIA grounds was denied on September 12, 2003 (*MM Global Servs.* v. *Dow Chem. Co.* (D. Conn. No. 3:02cv1107)). Further proceedings in those cases, including the disposition of various federal defenses raised in the proceedings, would provide the Court with both a more developed record and a more complete understanding of the many interrelated issues raised by international antitrust litigation.

At the very least, the Court should await a decision and subsequent petition for certiorari from the Third Circuit's ruling in *BHP New Zealand Ltd.* v. *UCAR Int'l Inc.*, Nos. 01-3329, 01-3340 & 01-3991 (argued Mar. 11, 2003), in which the proper construction of Clause 2 is dispositive. See CA3 Nos. 01-3329, 01-3340, 01-3991 Oral Arg. Tr., *UCAR* 4 ("Our appeal presents one main issue of law which is whether the district court erroneously interpreted the Foreign Trade Antitrust Improvements Act of 1982."). As counsel for the defendants in *UCAR* (who is also co-counsel to petitioners in this case) advised the Third Circuit at argument, "the [Supreme] [C]ourt would benefit from your views." Oral Arg. Tr., *UCAR* 28.[9]

[9] In *UCAR*, unlike this case (see *supra*), the question of the effect of the defendants' conduct on U.S. commerce has been finally resolved in favor of the plaintiffs. See Oral Arg. Tr., *UCAR* 17.

Petitioners' contrary argument – that this Court's immediate intervention is required in order to staunch the "flood" of similar cases (Pet. 3) – is hyperbole. The identical allegation was made after the Second Circuit's March 2002 decision in *Kruman*. See, *e.g.*, Pet. for Cert., *Kruman* 10 (predicting "a flood" of litigation). So far as respondents are aware, in the time since the Second Circuit decided the *Kruman* case, only a single additional international antitrust action that would implicate the question presented has been filed anywhere in the country. Indeed, at the very most, a *dozen* cases have *ever* been brought in the U.S. courts raising the issue.

Petitioners' characterization of the question presented as "frequently recurring" (Pet. 3) is thus similarly inaccurate. Congress enacted the FTAIA in 1982. Yet the issue has thus far been decided in only three appellate cases, all quite recently. None has produced a single follow-up decision. "Although passed two decades ago, few federal courts have had occasion to apply the [FTAIA]." *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293, 299 (CA3 2002). That fact confirms that this Court would benefit substantially from permitting the question presented to percolate further. Cf. *Den Norske*, 241 F.3d at 429 ("Because few courts have directly addressed the specific meaning of the FTAIA's Section 2 requirement that a domestic effect 'gives rise' to the plaintiff's antitrust claim, very little case law exists to aid our inquiry.").

Moreover, whatever the importance *of the question presented*, the supposed *conflict* in the courts of appeals itself lacks practical significance. Some circuit splits affect primary conduct because they render activity lawful in certain jurisdictions but unlawful elsewhere. This case, by contrast, is just a fight about money – the size of damages awards. For petitioners do not dispute that they can be sued over the *identical conduct* by foreign and domestic plaintiffs who are harmed as a result of effects on U.S. commerce. Further, petitioners contend that their conduct is subject to rigorous enforcement by other

jurisdictions. Cf. Br. for U.S., *Den Norske* 16 n.7 (lauding the "global response to the international 'bulk vitamins cartel'" as "illustrat[ing] energetic enforcement efforts against cartels operating worldwide").[10]

Any conflict furthermore falls at the margins of federal antitrust law. It has been settled for nearly sixty years that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993) (citing *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416 (CA2 1945) (L. Hand, J.)). See also *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582-83 n.6 (1986); *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (CA1 1997). As the United States explained below,

> It is settled that the Sherman Act extends to foreign conduct with intended and substantial effects on United States commerce, and that the FTAIA provides for jurisdiction under the Sherman Act over a claim by a plaintiff that suffers injury arising from direct, substantial, and reasonably foreseeable anticompetitive effects of foreign conduct on United States commerce, whether the plaintiff is located in the United States or abroad.

U.S. C.A. Br. 8.

Finally, as an institutional matter, this Court's intervention into this controversy is unnecessary at this time, because Congress is better equipped to resolve any uncertainty regarding

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[10] Nor does the status quo present the prospect of forum shopping. Not only has little international antitrust litigation followed in the wake of the D.C. and Second Circuits' decisions (see *supra*), but petitioners are unable to identify any case in which the plaintiffs avoided the Fifth Circuit as a logical forum. Both MDL procedures (in complex litigation) and doctrines such as forum non conveniens (in other cases) ensure that litigants do not take advantage of particular circuits' rules in this context. Further, even before the courts of appeals uniformly rejected the holding of *Den Norske*, plaintiffs were free to pursue their claims in the great many circuits that had not decided the question.

the FTAIA's meaning. Although this Court appropriately resolves conflicts in statutory interpretation that the legislature leaves unresolved for an intolerable period of time, this is not such a case; the purported conflict is brand new. Congress should reasonably be expected to address both the perceived conflict and the emergence of foreign antitrust legislation on its own initiative. But this Court's intervention could render that prospect less likely, not more.

4. Petitioners rightly do not claim a conflict on the question whether plaintiffs have "standing" to assert an antitrust claim in these circumstances, but they do contend that the decision below "is inconsistent" with *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293 (CA3 2002). Pet. 11. Petitioners characterize *Turicentro* as holding "that plaintiffs whose injuries occurred exclusively in foreign markets lack standing." *Id.*

Petitioners' reading of *Turicentro* is too strained. At the very least, that decision is too ambiguous to give rise to a genuine circuit conflict, particularly given that the court's discussion of standing was unnecessary to its decision and thus dictum.[11] The Third Circuit in *Turicento* ultimately found it unnecessary to decide the meaning of Clause 2 because the alleged conspiracy in that case affected *only* foreign commerce, such that "the complaint contained no allegations amounting to *any* 'effect' on United States commerce." 303 F.3d at 304 (emphasis added). On that basis, the court held that the plaintiffs' complaint was properly dismissed because jurisdiction was lacking under any reading of Clause 2. *Id.* Petitioners do not claim a conflict with this central holding of *Turicentro*.

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[11] Indeed, petitioners implausibly read this dictum in *Turicentro* to render the Third Circuit's analysis of Clause 2, which was the central issue in the case, irrelevant. Petitioners contend that the court of appeals ruled that all persons injured outside the United States lack antitrust standing. See Pet. 11. On that view, the Third Circuit had no cause at all to consider the issue that principally occupied its opinion: whether Clause 2 of the FTAIA confers jurisdiction on such plaintiffs.

Petitioners instead rely on the fact that the Third Circuit went on to discuss standing in three paragraphs. Recognizing that the question of standing "implicates many of the same issues as the jurisdictional analysis," the court held that the "plaintiffs lack antitrust standing" "*for the reasons noted*" in its jurisdictional analysis. 303 F.3d at 307 (emphasis added). The court adhered to its understanding of this Court's holding that "the standing inquiry in antitrust cases is dependent on the finding of subject matter jurisdiction." *Id.* (citing *Assoc. Gen. Contractors, Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 535-45 (1983)). The Third Circuit thus held that standing was lacking because the plaintiffs were not harmed by a conspiracy that affected the United States, and thus the injuries they suffered were "not of the type Congress intended to prevent." *Id.* That holding presents no conflict with the D.C. Circuit's decision in this case, in which respondents allege (and will prove on remand) that petitioners' conspiracy did affect U.S. commerce.

Petitioners nonetheless rely on the fact that the Third Circuit noted in one sentence that "[p]laintiffs' injuries occurred exclusively in foreign markets." Pet. 11 (quoting 303 F.3d at 307). But that statement merely reflects one of the facts of the case; it did not purport to set forth all the facts relevant to the court's standing analysis. Nor can petitioners' reading be reconciled with the Third Circuit's actual conclusion that standing was lacking "for the reasons noted," *i.e.*, that the case presented no injury to U.S. commerce whatsoever. *Id.*

III. The Decision Below Is Correct On The Merits.

The D.C. Circuit correctly recognized that its was the superior interpretation of Clause 2 not only in light of the "literal reading of the statute, but also in light of the statute's legislative history and underlying policies." Pet. App. 20a. Petitioners thus misrepresent the decision below, implausibly claiming that the D.C. Circuit eschewed "the text of the FTAIA" in favor of "selected statements in the House Report on the FTAIA," and "most important * * * for the court * * * its determination that, as a matter of policy, 'suits by foreign purchasers harmed solely

by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies.'" Pet. 6-7. In reality, the court of appeals concluded, based on a careful study of the text, structure, and legislative history, that petitioners' position would require engrafting onto the FTAIA restrictions that Congress did not enact and that furthermore conflict with the policies Congress was avowedly pursuing.

1. Petitioners rely on the fact that that "the jurisdictional limitation of section 2" "expressly requir[es] that a claim must 'arise from' a U.S. effect." Pet. 21. But this supposed "arise from" requirement does *not* appear anywhere in the FTAIA; it is an invention of petitioners. In reality, Clause 2 provides that the defendant's conduct must "give rise[] to a claim" under the Sherman Act. Petitioners would rewrite that clear language to require that the defendant's anticompetitive acts give rise to "the plaintiff's claim." That is the less plausible reading. "[A]dopting the defendants' interpretation would mean rewriting the statute to replace the word 'a' in subsection 2 with the words 'the plaintiff's', resulting in a new subsection 2 that requires that the 'effect give[] rise to *the plaintiff's* claim.' * * * Here, the language is clear. Congress used the indefinite article ('a') rather than the definite article ('the'). As a court, we must be faithful to, and honor, legislative meaning." *Kruman*, 284 F.3d at 400.

The fact that there are limited circumstances in which a departure from the plain meaning of the indefinite article "a" is appropriate does not assist petitioners (contra Pet. 14), because neither the text nor the structure of the statute provides substantial support for their reading. Petitioners' contention that Clause 2 is "most natural[ly]" read to refer to the plaintiff's claim (Pet. 13) is thus unexplained and in any event incorrect. The FTAIA delimits the "conduct" to which the Sherman Act applies. "Sections 1 to 7 of this title *shall not apply to conduct* involving trade or commerce (other than import trade or import commerce) with foreign nations *unless* * * *." 15 U.S.C. 6a (emphases added). Clause 2 specifically directs that the effect of the defendant's conduct on U.S. commerce must "give[] rise to a claim" under the Sherman Act.

On petitioners' view, in a single case, the identical anticompetitive "conduct" – *e.g.*, a price-fixing conspiracy like petitioners' – is simultaneously subject to the Sherman Act (if the plaintiff was injured in the United States) and immune under the Act (if the plaintiff was injured elsewhere). That reading cannot be reconciled with the statute's structure, which speaks of "conduct" in a unitary sense. Respondents' reading better reflects the design of FTAIA, as it renders "conduct" subject to the Sherman Act without regard to the identity of a particular plaintiff.

Petitioners' only possible response is that the "conduct" in question under the Sherman Act is the particular transaction in which the plaintiff was injured. But *that* argument conflicts with basic antitrust principles and accordingly has been rejected by *every* circuit. As the court of appeals explained:

> Essentially, appellants argue that the relevant conduct is the "massive international cartel, exercising global market power." Appellees argue that the relevant conduct is solely the market transactions between them and the foreign plaintiffs overseas. Both the Second *and Fifth* Circuits have adopted appellants' approach, and appellants' approach is correct.

Pet. App. 9a (citations omitted) (emphasis added). As in *Kruman*, "[t]he illegal act in this case was not the imposition of high prices but the formation of the agreement to fix prices. * * * The 'essence' of the section 1 violation alleged by the plaintiffs 'is the illegal agreement itself – rather than the overt acts performed in furtherance of it.'" *Kruman*, 284 F.3d at 398-99 (quoting *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991)).[12]

[12] The fact that the Sherman Act "den[ies] jurisdiction" over "*conduct* affecting wholly foreign commerce" (Pet. 17 (quoting John H. Shenefeld, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 Fordham L. Rev. 350, 364 (1983) (emphasis added)) thus is of no moment, for petitioners' "conduct" had enormous, anticompetitive effects in this country.

Petitioners' reading would also render the proviso to the FTAIA surplusage. The statute provides, "If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B) [concerning export trade], then sections 1 to 7 of this title shall apply to such conduct only for injury to export business *in the United States*." 15 U.S.C. 6a (proviso) (emphasis added). Inexplicably, the petition affirmatively invokes the proviso as supposedly illustrating that the Sherman Act applies "only in the case of 'a person engaged' in such trade '*in the United States*' and '*only* for injury to export business *in the United States*.'" Pet. 13 (emphases in Pet.). On petitioners' view, however, the provision is meaningless because *all* conduct (not the limited subset covered by the proviso) is actionable only to the extent it causes injury "in the United States." The proviso furthermore demonstrates that Congress was perfectly capable of crafting in plain terms the limitation that petitioners would read into the statute.

For all of the foregoing reasons, respondents' reading is the one embraced by the Restatement of the Foreign Relations Laws. In the FTAIA,

> Congress apparently believed that activity whose anti-competitive effects are felt *only* in foreign states should not be a concern of United States antitrust regulation, but that activities carried out abroad that have "direct, substantial, and reasonably foreseeable" effect in the United States or on the import trade of the United States (as by limiting imports or fixing the price of imported products) should be subject to the Sherman and FTC Acts.

Restatement (Third) of the Foreign Relations Laws § 415 cmt. b (1987).

2. In light of the statute's text and structure, petitioners' heavy reliance on legislative history (see Pet. 14, 17-18, 21, 23) is unavailing. But in any event, the history supports respondents. To the extent Clause 2 is particularly concerned with non-export commerce, Congress in that provision resolved the disagreement over the effect on U.S. commerce necessary to give rise to a Sherman Act claim. Whereas most courts had deemed anticompetitive conduct to be actionable so long as it

had a foreseeable "effect" on U.S. commerce, "[c]onsiderations of international comity * * * occasionally entered the analysis of later courts." *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293, 298 (CA3 2002). See also *Dee-K Enters., Inc.* v. *Heveafil Sdn. Bhd.*, 299 F.3d 281, 288 (CA4 2002) ("In the decades after *Alcoa*," courts "disagreed as to whether antitrust jurisdiction over foreign conduct requires both 'an effect' on United States commerce and an 'intent to affect United States commerce,' or just effect or just intent, and as to the magnitude of any effect."). The year before Congress enacted the FTAIA, the Second Circuit, which had first endorsed the "effects" test, modified its rule to specify that the Sherman Act applied only if the effect on U.S. commerce was anticompetitive. See *National Bank of Canada* v. *Interbank Card Assoc.*, 666 F.2d 6, 8 (1981). That is precisely the rule Congress adopted soon thereafter in the FTAIA when it provided that the effect on U.S. commerce must "give[] rise to a claim." Of particular note, the definitive report on the statute "specifically and approvingly references *National Bank of Canada*." *Kruman*, 284 F.3d at 401 (quoting H.R. Rep. 97-686, at 11 (citing *National Bank of Canada* for the proposition that "the domestic 'effect' that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit")). The House Report thus explains:

> [A] plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

In effect, Clause 2 imports the requirement of "antitrust standing" that a plaintiff may recover only for "injur[ies] of the type the antitrust laws were intended to prevent" – namely, injuries that "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).

Petitioners' repeated reliance on the House Report is thus unavailing. The D.C. Circuit carefully reviewed this report, correctly concluding that on balance it supported respondents. The court of appeals' careful study could not be further afield from reliance on "selected statements" and "fragments" from the legislative history. Contra Pet. 6, 18. The court of appeals recognized that the excerpts repeatedly invoked by petitioners (to the effect that persons injured in U.S. commerce have a right to bring suit) do not undermine the remaining discussion in the Report that equally demonstrates that Congress was not concerned with the locale of the plaintiff's injury:

> Parts of the report from the House Committee that drafted FTAIA suggest that plaintiffs injured by the U.S. effects of the anticompetitive conduct may sue, which of course is consistent with the restrictive view of FTAIA's jurisdictional reach. However, there is much in the legislative history to suggest that foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so long as the conduct also harms U.S. commerce.

Pet. App. 24a. The legislative history cited by petitioners thus "does not (when read in context) denigrate or exclude the less restrictive view." *Id.*[13]

Petitioners' claim that, before the Second Circuit's decision in *Kruman*, "no court had ever held that the federal antitrust laws authorize claims seeking to remedy harms resulting solely from the effects of anticompetitive conduct on *non-U.S.* commerce" (Pet. 4) is misleading. The established rule in this

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[13] Petitioners' reading is also inconsistent with the history of the provision that became Clause 2. The original version of the FTAIA provided that the effect on U.S. commerce must be "the basis of the violation alleged under this Act [*i.e.*, the Sherman Act]." H.R. 5235, 97th Cong. § 2 (1982). The House specifically replaced that language with the text Congress later enacted to *avoid* the incorrect suggestion (which petitioners now press) "that an effect, rather than conduct, is the basis for a violation." House FTAIA Report 18. Petitioners would read this aspect of the legislative history precisely backwards. See Pet. 14.

country since at least the 1940s has been that a suit may be maintained under the Sherman Act *so long as* the defendants' conduct affected U.S. commerce. See *supra*. No decision imposed petitioners' proposed limitation that defendants are immune from paying damages to persons injured in foreign markets. Petitioners thus err (Pet. 3, 4) in characterizing the decision below as "holding that the [FTAIA] provides foreign plaintiffs with a U.S. antitrust remedy" and "that the FTAIA in effect *expanded* the extraterritorial reach of the Sherman Act." The remedy is provided by the plain terms of the Sherman and Clayton Acts. And Congress, by enacting the FTAIA in 1982, did not adopt any restriction on that remedy applicable to this case.[14]

3. Petitioners also contend that policy considerations support their reading of Clause 2. "But general policy considerations cannot justify reading the FTAIA in a way contrary to its unambiguous text." *Kruman*, 284 F.3d at 402. Further, petitioners are simply not correct in asserting that the D.C. Circuit's decision will undermine this nation's relationships with its trading partners. There is no evidence that the pendency of this action has inhibited the investigation of petitioners' conspiracy by foreign competition authorities, which have levied considerable penalties. See, *e.g.*, Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of*

[14] Petitioners also misdescribe the import of their own position when they characterize the D.C. Circuit's decision as "provid[ing] foreign plaintiffs with a U.S. antitrust injury" and "[p]ermitting foreign plaintiffs to reject the means chosen by their own nations to protect competition," and when they further argue that "Congress did not intend to have the federal antitrust laws regulate transactions between foreign buyers and foreign sellers." Pet 1, 23. The question presented has absolutely nothing to do with the plaintiffs' and defendants' citizenship. Petitioners' position would both extinguish suits by U.S. residents and also immunize U.S. defendants from liability for injuries arising from overseas transactions.

International Competition Law, 68 Antitrust L.J. 711, 714-18 (2001).[15]

To the extent there is any foreign distaste for U.S. antitrust policy, that has been the norm for decades without any ill effects on U.S. trade relationships and without provoking a further response from Congress after the FTAIA. "The *Alcoa* decision [by Judge Learned Hand] was not warmly received in other countries, which as of the mid-1940s did not as a rule have antitrust laws and which resented the apparent effort of the United States to act as the world's competition police officer." *United Phosphorus, Ltd.* v. *Angus Chem. Corp.*, 322 F.3d 942, 960 (CA7 2003) (en banc) (Wood, J. dissenting).[16] Similarly, "[a] decade ago, after [this Court's decision in] *Hartford Fire Insurance Co.* v. *California*, commentators by and large echoed a single criticism: 'The death of interest-balancing meant that courts were left with no choice but to apply the Sherman Act to foreign conduct in a manner that would create foreign relations trouble for the United States.'" Salil K. Mehra, *"A" Is for Anachronism: The FTAIA Meets the World Trading System*, 107 Dick. L. Rev. 763, 763 (2003) (citations omitted). Certainly, nothing about the recent pendency of international antitrust actions has undermined U.S. trade relations. "Interestingly, the number of disputes over so-called extraterritorial applications of national laws, whether by the United States, the European Union, or others, has dropped dramatically." *United Phosphorus*, 322 F.3d at 961 n.1 (Wood, J., dissenting).

[15] The facts of this case also establish that petitioners' foreign policy arguments are seriously overbroad. "Respondents are five foreign companies located in Australia, Ecuador, Panama, and Ukraine." Pet. 5. Petitioners fail to identify relevant competition laws in those nations or to explain how this action imperils relations with them.

[16] Thus, if anything, the expansion of aggressive antitrust regimes in other countries *reduces* the conflict created by the previous reluctance of our trading partners to regulate anticompetitive conduct.

Further, petitioners' claim that in recent years foreign governments have greatly expanded their own antitrust regimes (see Pet. 23) amounts to no more than a request for a judicial amendment to the FTAIA, which Congress enacted in 1982. As petitioners acknowledged below, their position is thus ultimately that "there has been tremendous change in international antitrust enforcement in the [past] 25 years." C.A.D.C. No. 01-7115, Oral Arg. Tr. 28. And petitioners make the same point in arguing that Congress has greatly expanded the maximum criminal penalties under the Sherman Act since 1982 (see Pet. 19) and that, still more recently, the Executive Branch has expanded its use of amnesty programs (*id.* 20). If petitioners and the Executive Branch believe that the time has come for a change in U.S. antitrust policy, they certainly can make that argument to Congress.

But in any event, "the FTAIA was not passed for the purpose of accommodating our trading partners. Any advantage the FTAIA provides them is largely incidental." Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 780 (1986). Congress's concern in the federal antitrust laws, including in the FTAIA, was instead to protect U.S. markets from anticompetitive conduct *wherever manifested* without inhibiting conduct by domestic corporations that has no adverse effect in this country. Although petitioners contend that "[c]artel conspiracy cases are massive[and] sprawling" (Pet. 24), the more accurate and relevant point is that the *cartels themselves* are "massive and sprawling," leading Congress to conclude that they pose substantial threats to U.S. commerce. Only respondents' reading is consistent with that purpose, as the D.C., Second, and Seventh Circuits have all recognized:

> [I]f foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be underdeterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability. In any case, the profitability of the global conspiracy would depend on the uncertainties of foreign antitrust enforcement. The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy.

Pet. App. 32a-33a.[17]

[17] See also *Kruman*, 284 F.3d at 393 ("There is a distinction between anticompetitive conduct directed at foreign markets that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets. The antitrust laws apply to the latter sort of conduct and not the former. Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets."); *Metallgesellschaft AG*, 325 F.3d at 842 ("A global conspiracy to inflate prices could have anticompetitive effects on the U.S. economy whether the conspiracy occurred within the United States or abroad."); Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 Antitrust 53, 53 (2001) (petitioners' view would "change[] the calculus of risk for rational cartel participants in a way that significantly decreases the law's deterrent effect on international cartels").

That conclusion is also supported by this Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), which the House Report cites favorably. Contra Pet. 19. The relevant discussion in *Pfizer*, directly applicable here, is this Court's recognition that the failure to enforce the U.S. antitrust laws in circumstances involving foreign commerce could lead to arbitrage, as monopolists and price-fixers cover their losses in this country with gains elsewhere. See 434 U.S. at 315. Certainly, nothing about the question presented makes "clarification" of *Pfizer* "necessary." Contra Pet. 19 n.4. The judgment about the scope of the federal antitrust laws is one that Congress has already made.

It is in this respect that petitioners' reliance (Pet. 16) on the Areeda treatise is fundamentally misplaced. To be sure, "the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers." IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 272h (2d ed. 2000), *quoted at* Pet. 16.[18] But the far more relevant point is that the antitrust laws protect Americans through rigorous pursuit of international cartels. "Clause number (2) simply reminds us that the [statute] does not itself define any substantive offense; once the effects specified there are shown to exist, a plaintiff will then be allowed to prove, if it can, that the defendant's conduct violates the legal standards of Sherman Act §§ 1-2." IA Areeda & Hovenkamp, *supra*, ¶ 272h2.

Petitioners' contrary theory that the D.C. Circuit's decision will overdeter antitrust violations – by creating such substantial civil penalties that conspirators will not cooperate with the Department of Justice's expanded amnesty program – is unpersuasive or, at most, a recent development properly raised before Congress as a ground for amending the FTAIA. The D.C. Circuit properly recognized that the fundamental premise of the Sherman Act, including its treble-damages provisions and expansive jurisdictional scope, is that the potential for substantial penalties deters conspiracies from arising *in the first place*. Indeed, that premise is confirmed by the power of the Department of Justice itself to determine fines based on the worldwide effects of the defendants' conspiracy.[19]

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[18] It is equally true, of course, that the concern of the U.S. antitrust laws is not protecting *defendants such as petitioners*, who concededly engaged in a massive conspiracy that caused serious harm to the U.S. economy and to U.S. consumers, resulting in record fines.

[19] To the extent that "[t]he FTAIA was enacted in 1982 to address concerns that unduly expansive projection of federal antitrust law would hinder U.S. global competitiveness" (Pet. 4), that purpose is reflected in a provision not at issue here – *viz.*, the statute's proviso, which states that effects on export commerce are

4. For the same reasons that respondents' construction of the FTAIA is correct, they have "antitrust standing" – *i.e.*, the injury suffered by respondents is of the sort the antitrust laws were designed to prevent. "[T]he arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intend to prevent the harm that the foreign plaintiffs suffered here." Pet. App. 36a. Even the Fifth Circuit agrees that the standing determination follows *a fortiori* from the conclusion that jurisdiction exists or is instead lacking under the FTAIA. *Den Norske*, 241 F.3d at 431 n.32.[20]

Petitioners' contrary standing analysis is insupportable. They jump from the proposition that (under Clause 1) "'a direct, substantial, and reasonably foreseeable effect' on U.S. commerce is necessary for *foreign conduct* to be unlawful" directly to the unrelated conclusion that "as a matter of antitrust standing, only injuries that 'flow from' those U.S. effects are actionable." Pet. 21 (emphasis added). The simple answer is that this is not a case about "foreign conduct" as that term is used in the antitrust laws. Petitioners conceded below for

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actionable "only for injury to export business in the United States." Thus, "Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods *by exempting export transactions* that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade." *Carpet Group Int'l* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 71 (CA3 2000) (emphasis added). As petitioners elsewhere acknowledge (albeit with misplaced emphasis), this Court has explained that "[t]he FTAIA was intended to exempt from the Sherman Act *export transactions* that did not injure the United States economy." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 n.23 (1993) (emphasis added) (emphasis from Pet. 16 omitted).

[20] Contrary to petitioners' suggestion (Pet. 20), the federal government did not contend below that respondents lack antitrust standing.

purposes of this appeal that their conduct *did* affect U.S. commerce. See *supra*.[21]

CONCLUSION

The petition for certiorari should be denied.[22]

Respectfully submitted,

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[21] In any event, petitioners did not even make this standing argument in the court of appeals, illustrating that these questions remain poorly developed. Petitioners' court of appeals brief did not even mention Clause 1 in its discussion of standing. See Petrs' C.A. Br. 41-45.

[22] Petitioners also appropriately do not suggest that there would be any benefit in this case to soliciting the views of the United States, which have already been expressed in its invitation brief in *Den Norske*. As the Petition explains, the invited *amicus* brief of the United States in the court of appeals agrees with petitioners on the merits of the first question presented (which was also its position in its invitation brief in this case in *Den Norske*) and recognizes a circuit conflict. The arguments set forth in this Opposition regarding whether this is the appropriate time and the appropriate case to decide any conflict would not be advanced (and the progress of the case could be considerably impeded) by issuing another invitation for the government to submit its views yet again.